No. 20,241

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EL RANCO, INC., a Nevada corporation, EL RANCO HOTEL OPERATING COMPANY, a Nevada corporation, BELDON R. KATLEMAN, JCA Artists, Ltd., a Delaware corporation, ROY GERBER and MATT GREGORY,

Appellants,

vs.

THE FIRST NATIONAL BANK OF NEVADA, as Administrator of the Estate of Rene Bardy, deceased,

Appellee.

PETITION FOR REHEARING.

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To the Honorable Oliver D. Hamlin, Jr., Circuit Judge, M. Oliver Koelsch, Circuit Judge, and James R. Browning Circuit Judge:

Appellants herein, El Ranco, Inc., a Nevada corporation, El Ranco Hotel Operating Company, a Nevada corporation, and Beldon R. Katleman, hereby petition for a rehearing to reconsider the judgment entered in this action on October 30, 1968, on the following grounds:

I.

The Court Has Misapprehended the Facts and Law With Respect to the Assignments to Bardy.

In its opinion the Court recognized that under Nevada law an assignment of a claim to plaintiff does

not relate back to the commencement of the action and under such an assignment the plaintiff is not the real party in interest (p. 4). This Court distinguished the applicable Nevada decisions (*Thelin v. Intermountain Lumber,* 80 Nev. 285, 392 P. 2d 626 [1964]; *Las Vegas Network, Inc. v. Shawcross,* 80 Nev. 405, 395 P. 2d 520 [1964]) on the basis that Bardy possessed an interest at the time the action was commenced and the jury in effect so found by rendering a verdict for Bardy on his contract claim.

Appellants submit that such distinction is not supported by the facts.

Aside from the merits issue, the most strongly litigated issue was whether Bardy was the real party in interest. Aware of this problem, Bardy obtained the assignments after the action was commenced. By their admission into evidence, over objection, the issue of real party in interest was to all intents and purposes removed from the case. If the jury believed Bardy was the proper party in interest it could award him a verdict. If it felt he was not, it could nevertheless award him a verdict because of the assignments.

This court, in effect, has held that the assignments were improperly admitted because they postdated the commencement of the action but that such admission was not prejudicial because Bardy "possessed an interest at the critical date" (p. 5). Whether or not he did was for the jury to decide. To hold that it so decided begs the question, because once the assignments were admitted into evidence, the jury had to find that if a verdict was to be returned on the contract or conspiracy claim, or both, it had to be in Bardy's favor. Under such circumstances how can it be determined

whether the award to Bardy on the contract claim or the conspiracy claim was based on the jury believing Bardy possessed an interest at the time of filing or as a result of the assignments? The jury had the assignments before them [T. 3226, line 13, to T. 3227, line 22].*

And even if the jury, by ruling for Bardy on the contract claim, necessarily found that he could agree to present the show and use its name and receive moneys for doing so, how about the items for which the conspiracy damages were awarded, including the use of "performers in a show in his Paris nightclub from July 29th, 1959 to October 21, 1959" (p. 16). On this score it is undisputed that the nightclub was owned by Mansart and was operated at all times by a societé and Bardy received income only in the form of author's royalties through dummies [T. 1434, lines 7-15; T. 1439, line 24, to T. 1440, line 13].

Thus, the real party in interest issue became a "heads I win, tails you lose" proposition.

This court has said that appellants were not prejudiced by the admission of the assignments (p. 5). Surely, the effective removal of the real party in interest issue was prejudice of the higher order.

Appellants submit that this court's statement that appellants could not have been prejudiced because "no proof whatever was offered or admitted of any injuries suffered by the assignors with respect to the subject matter of the assignments during the period following the filing of the complaint" (p. 5) misapprehends the holdings in *Thelin* and *Shawcross*.

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*On pages 55 and 56 of the Brief of these appellants numerous possibilities as to jury thinking are set forth.

Those decisions lay down the flat substantive rule of law that a plaintiff must own the claim at the time he commences his action. They do not provide that a defendant must prove that the assignor suffered injury or damage after the filing of the complaint. Indeed, the writer respectfully submits that it is difficult to imagine how an assignor can be damaged after he has assigned away his rights. As shown above the appellants were vitally prejudiced by the admission into evidence of the assignments.

II.

The Court Has Overlooked the Facts With Respect to the Nevada Fictitious Name Statute.

In holding the Nevada fictitious name statute inapplicable, this court said that

> "it was not disputed that Bardy entered Nevada for the sole purpose of presenting his review at the El Rancho Hotel and with the definite intention to leave at the end of the engagement, that his business dealings were limited to matters incidental to such presentation and that his actual stay was not of long duration" (p. 6).

It may well have been Bardy's intention at the time of entry into Nevada to return to Paris at the end of the engagement, but that intention was not maintained. A new contract extending the engagement for 8 weeks was entered into [Ex. 472], Gerber attempted to sell the show to the Mapes Hotel in Reno, Nevada, to appear after it left the El Rancho [T. 2573, line 16, to T. 2574, line 21] and Lou Walters, at the request of Bardy, attempted to sell the show to other Las Vegas hotels [T. 949, line 12, to T. 951, line 19]. Of even greater

significance is the fact that Bardy's compensatory damage claim was based primarily on the theory (approved by this court) that the "show could have been booked in Las Vegas on a continuous basis with longer and better engagements . . ." (pp. 18, 19). Surely, the foregoing indicated much more than a single or isolated transaction.

This court, after setting forth the quoted language in the first paragraph of this point, concluded, "[O]n these facts we cannot say that the statute would apply" (p. 6). Even if this court, after considering the facts set forth above, could nevertheless similarly conclude, the question should really be whether the court can say that as *a matter of law* the statute does not apply. Manifestly a fact question on the issue was presented. The jury should have decided the question under appropriate instructions. It should not have been taken away from it.

III.

The Court Has Overlooked the Impact on the Jury of the Trial Judge's Attitude.

In its opinion this court appears to recognize that the Trial Judge moved the case along at a fast pace. The Judge's attitude was directed almost entirely at appellants, curtailing examinations and cross-examinations by their counsel and requiring them to stipulate to many facts. As shown by Appendices A and B of the Brief of these appellants much of the limitations imposed were accompanied by remarks to the effect that Bardy was not discredited.

What was the impact of such attitude on the jury? The jury was in an enormous hurry to get the case

finished. When the Judge wanted to recess the trial prior to instructing the jury, the jury requested that it be instructed at night [T. 3047, line 22, to T. 3050, line 12; T. 3050, line 18, to T. 3060, line 5]. Based on the attitude and remarks of the Trial Judge the jurors could well have believed that the Judge felt Bardy should get a verdict and appellants' counsel was wasting time. How else can we rationalize the large punitive damage award?

Wherefore, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the judgment of the District Court be, upon further consideration, reversed.

Samuel S. Lionel and
Leo K. Gold,
Attorneys for Appellants.

Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

Dated: November 12, 1968.

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